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Supreme Court of the United States

October Term, 1974
No. 74-1412

PRO ARTS, INC., *et al.*,
Petitioners,

vs.

ROBERT L. BELL, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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Statute

United States Copyright Act:

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17 U.S.C. Sec. 101(b) 2

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This is an action for copyright infringement.

The petition presents no ground for review by certiorari.

There is no claim that the decision below is in conflict with the decision of another Court of Appeals.

The issues are factual—whether, as Pro Arts contends, the copyrighted work, a poem styled DESIDERATA, is in the public domain and whether the damages assessed were excessive.

OPINIONS BELOW

The opinion of Chief Judge Frank J. Battisti (N.D. Ohio E.D.) is reported in 366 F. Supp. 474 and is reproduced in petitioners' Appendix B, pp. 10-46.

The opinion of the United States Court of Appeals for the Sixth Circuit (Phillips, Chief Judge, Miller, Circuit Judge and DeMascio, District Judge) is reported in 511 F.2d 451 and is reproduced in petitioners' Appendix A, pp. 7-10.

STATUTE INVOLVED

The United States Copyright Act, 17 U.S.C. §101, provides in pertinent part:

"§101 *Infringement*

"If any person shall infringe the copyright in any work protected under the copyright laws of the United States [as here] such person shall be liable:

* * * * *

"(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement . . . or *in lieu** of actual damages and profits, such damages as to the court appear to be just, and in assessing such damages the court may, in its discretion, allow the amount hereinafter stated . . . and such damages shall in no case exceed the sum of $5,000, nor be less than the sum of $250, and shall not be regarded as a penalty."

QUESTIONS PRESENTED

The questions Pro Arts seeks to raise are:

1. Whether respondent Bell's copyright is valid and infringed;

*Emphasis supplied throughout.

2. Whether the trial court correctly allowed damages in the sum of $5,000, pursuant to the discretionary authority granted by statute.

STATEMENT OF THE CASE

Findings by the two courts below, which Pro Arts has not challenged, show that despite repeated demands, Pro Arts continued to infringe (Findings of Fact 20-36, petitioners' Appendix B, pp. 22-34).

Unchallenged findings by the two courts below also show that Bell diligently policed his copyright (Findings of Fact 5 and 39, petitioners' Appendix B, pp. 12-13 and 35-36).

Pro Arts continued to infringe after written notice to cease and desist with respect to the sale of more than 2,000 infringing posters containing the text of DESIDERATA. The *total* number of infringements, however, was far greater. Pro Arts kept no records as to the additional number, prices or sources of infringing posters which it admittedly purchased or traded (Conclusions of Law 5 and 10, petitioners' Appendix B, pp. 37-38 and 41-42).

Both courts below found that since Bell's damages were not readily ascertainable*, statutorily prescribed *in lieu* damages of $5,000 should be awarded (Conclusions of Law 11-13, petitioners' Appendix B, pp. 42-44).

*See Court of Appeals affirming opinion "It is apparent that appellant's damages were not readily ascertainable. The failure of appellant to cooperate during pretrial discovery made it impossible to ascertain damages. Where actual damages are unascertainable, the court may award damages within the limits prescribed by 17 U.S.C. §101. The award by the district court here did not exceed those limits" (Petitioners' Appendix A, pp. 9-10).

ARGUMENT

I. Petitioners do not challenge the validity of respondents' copyright rights with respect to DESIDERATA.

Pro Arts did not, in the court below, challenge the validity of the copyright. It cannot do so now.

Stuff v. E. C. Publications (1965), 342 F.2d 143, on which Pro Arts relies, is inapplicable. There, the copyright failed because its owner ". . . had been most derelict in preventing others from infringing his copyright" (342 F.2d at 145).

Here the unchallenged Finding is that:

> "39. As of March 5, 1973, Bell [respondent] had, in addition to the present action, instituted four other lawsuits charging many others with infringements of DESIDERATA: licensed six prior infringers upon payment of royalties for past infringements; settled with five infringers who had paid damages; and had licensed ten other organizations to utilize DESIDERATA in variously defined ways and forms." (Finding of Fact 39, petitioners' Appendix B, pp. 35-36).

The diligence shown here, but wanting in *Stuff*, would make that case inapplicable even if this issue had been raised in the courts below—as it was not.

II. Pro Arts would challenge the award of $5,000 in lieu damages, as excessive.

The trial court was fully authorized, in its discretion, to award statutory *"in lieu"* damages, and to do so in the sum of $5,000.

This Court speaking through Mr. Justice Roberts held, in *Douglas v. Cunningham* (1934), 294 U.S. 207 at 210:

> "The trial judge may allow such [*in lieu*] damages as he deems to be just and may, in the case of an infringement such as is here shown, in his discretion, use as the measure of damages one dollar for each copy,—Congress declaring, however, that just damages, even for the circulation of a single copy, cannot be less than $250 and no matter how many copies are made cannot be more than $5,000.
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> * * * * *
>
> The employment of the statutory yardstick, within set limits, is committed *solely* to the court which hears the case, and this fact takes the matter out of the ordinary rule with respect to abuse of discretion. This construction is required by the language and the purpose of the statute."

Judge Augustus Hand put the matter this way in *Hartfield v. Peterson* (2d Cir. 1937), 91 F.2d 998 at 1001:

> "The appellants [as here] further contend that the award of $5,000 fixed by the District Court as statutory damages is too high. But we have no power to deal with such an objection when we find [as here] the copyright valid and infringed. The power to allow such damages *in lieu* of actual damages is, so far as it is exercised, within the limits of the statute,

a matter wholly for the trial court which we have no right to review."

CONCLUSION

No ground to disturb the findings, concurred in by the two courts below, having been shown, Certiorari should be denied.

Respectfully submitted,

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June 5, 1975